its administration, which guarantees to every class and creed of Her Majesty's subjects enjoyment of their own laws and religion.

32. Your Memorialists therefore most humbly pray that Your Excellency in Council may be pleased to pass an Act restoring to the Mussalman subjects of Her Majesty the Queen Empress the law of Wakfs as cherished and understood by them, that is to say, an Act *declaring the validity of* Wakfs *created by a Mahomedan constituting his children and descendants and kindred the immediate recipients of the benefaction;* in fact, to codify the law as it is to be found in the *Hedaya*, the *Fatawai Alumgiri* and other Text-books; or take such other steps for that purpose as may seem fit and proper.

And Your Memorialists, as in duty bound, shall for ever pray.

No. 9.—Appendix I to the Memorial; being a reproduction of the views expressed by Sir W. Comer Petheram, the late Chief Justice of Bengal, on the Mahomedan Wakf question from the "Law Quarterly Review" for 1897, to be found at page 383 of Vol. XIII of that Review.

**Mahomedan Law of Wakf.*

The question what is or is not a valid wakf according to Mahomedan law first came before me judicially in the year 1892 in the case of *Shuk Lal Podar* v. *Bikani Meah.* Mr. Justice Hill was sitting with me at the time, and as we found that there were two decisions of the court on the subject which appeared to us to be in conflict, we thought it right to refer the question to a full bench. The two cases are *Russomoy Dhur Chowdhry* v. *Abdul Fata Mahomed Ishak,* I.L.R., 18 Cal., 399, decided on February 24, 1891, by Tottenham and Trevelyan JJ., and *Meer Mahomed Isral Khan* v. *Sashti Churn Ghose,* I.L.R., 19 Cal., decided by O'Kinealy and Ameer Ali J.J., on March 18, 1892. In the first case the learned judges held that a wakf cannot be sustained unless the property is dedicated solely or, at least, primarily and substantially to religious or charitable objects. In the second case it was held that a wakf in favour of settler's children and kindred in perpetuity with a reservation of the whole income in favour of the settler himself for life was valid. The question was afterwards argued before a full bench of which Mr.

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* Referred to in paragraph 4, page 3, paragraph 11 (h), page 7, and paragraph 12, page 8, of the Memorial.

Justice Ameer Ali was a member, when three out of the five judges who composed the bench, took the view which had been taken in the first case, and Mr. Justice Ameer Ali adhered to the opinion he had expressed in the second. I thought that the particular case before us was concluded by the judgment of the Judicial Committee in the case of *Mahomed Ahsanulla Chowdhri* v. *Amar Chand Kundu*, I.L.R., 17 Cal., 498, delivered on November 9, 1889, in which the Committee ruled that in order to create a valid wakf according to Mahomedan law there must be a substantial and not an illusory gift of the propety to charitable uses, but declined to decide whether or not a gift of the property to charitable uses which was only to take effect after the failure of all the granter's descendants would be illusory. An examination of such Mahomedan books as were then accessible to me raised a doubt in my mind whether the decision of the Judicial Committee was in accordance with Mahomedan law as administered in Mahomedan countries, and an examination of the decision of the various courts in British India led me to think that until the decision of the case of *Amrita Lal Kalidas* v. *Shaik Hassan*, I.L.R., 11 Bombay, 492, by Mr. Justice Farran at Bombay on March 11, 1887, no one in India had suggested that a wakf under which the income of the property was reserved for the benefit of the founder for his own life, and after his death for that of his descendants in perpetuity, was not valid according to Mahomedan law. This impression was greatly strengthened by the fact that in the Tagore Law Lectures which were delivered by a Hindoo, Babu Shama Churn Sircar, in 1874, the doctrine is stated as clear and undisputed. In the judgment which I then wrote I endeavoured with all possible respect to indicate the doubt which existed in my mind. Afterwards on November 23 and December 15, 1894, the same question was again considered by the Judicial Committee, when the case of *Russomoy Dhur Chowdhri* v. *Abdul Fata Mohamed Ishak*, I.L.R., 22 Cal., 617, came before them on appeal from Tottenham and Trevelyan JJ. The Committee then re-affirmed their decision that the property in question must, in substance, be devoted to charitable purposes in order to make it a valid wakf according to Mahomedan law; and further laid it down as a principle of Mahomedan law that a provision for the poor after the total extinction of a family would be illusory. The effect of this decision is that any wakf under which the founder has reserved the income to himself for life and after his death to his descendants, cannot now be sustained in British India, and all rights and interests created and enjoyed under such wakf are destroyed. The decision of both points was necessary for the

decision of the case, and the ruling is, of course, binding on every judge in British India. The judgment of the Judicial Committee as delivered by Lord Hobhouse contains a passage for which I am sure the inhabitants of India, as well Hindoos as Mussulmans, will be grateful. It is as follows:—'Among the very elaborate arguments and judgments reported in Bikani Meah's case, some doubts are expressed whether cases of this kind are governed by the Mahomedan law, and it is suggested that the decision in Ahsanulla Chowdhri's case displaces the Mahomedan law in favour of English law. Clearly he Mahomedan law ought to govern a purely Mahomedan disposition of property.' After the judgment of the full bench had appeared, the subject was a good deal discussed by Mahomedans in India, and I was struck by the fact that every Mahomedan who spoke to me on the subject agreed with Mr. Justice Ameer Ali, and they all, both lawyers and laymen, asserted that there was no doubt that a wakf, as understood by Mahomedans, was such as he had described it in his judgment. At about the same time I had conversation on the subject with a gentleman who then occupied a very important position in the Government of India, but who had spent many years in official ipositions in Mahomedan countries. He assured me that the law, as laid down by the majority of the full bench, was not in accordance with the Mahomedan law, and that it was within his own knowledge that a very large proportion of the land, both in Turkey and Egypt, was held under family settlements created by way of wakfs constituted and conditioned in the way which Mr. Ameer Ali asserts is lawful according to Mahomedan law. As the matter appeared to me to be of considerable importance, I have thought it worthwhile to endeavour to ascertain how the law on the subject is understood and administered at the present time by Mahomedan judges in Mahomedan countries, and have quite easily obtained two French translations of books which appear to deal with the whole subject, and to indicate how the institution is regarded in Turkey, Arabia and Egypt. The title of one of these books is 'Droit Mussulman. Le Wakf ou Immobilisation d'après les Principles du Rite Hanifite. Traduit de l'Arabe par MM. Benoit Adda, Avocat, et Elias D. Ghalioungui, Interprète.' It was published at Alexandria in 1893 and contains two parts. The first part is a translation of an Arabic book written about 1489 A.D. The second, of an Arabic book written in the early part of the present century. I think it worthwhile to quote here one passage from the translator's preface, though perhaps, after the authoritative dictum, which I have already quoted, the proposition will not be disputed. They say (page 8): 'Nous espérons que notre ouvrage sera d'une utilité

pratique non seulement en Egypte; mais aussi dans tout l'Orient, car partout où règne l'Islamisme ce sont les mêmes us et coutumes qui sont en vigueur, et c'est avec raison que le savant orientaliste Docteur Worms a dit dans ses recherches sur la constitution de la propriété territoriale dans les pays Musulmans: "Tous les empires Musulmans ne sont que des fractions d'une même société soumise à la même Loi, au même Code administratif et politique, et où tout est identique et common jusqu'aux coutumes les moins importantes."' This book does not contain any such clear statement on the subject as that which I shall presently quote from the other, but from beginning to end it deals with the institution on the assumption that for a person to make a provision for his descendants is a good work, and is one to which a wakf may be properly devoted. The other book is a translation of a book written in Turkish and published in Constantinople in 1890. Its title is 'Lois régissant les Propriétés dédiées (Awkafs). Par Omar Hilmy Effendi. Tr. du Turc par C. G. Stavoidès and Simon Dahdah, 1895.' The following extract from the translator's preface will explain the writer's position and the character of the book:—

'Feu Omar Hilmy Effendi, Président de la Chambre Civile á la Cour de Cassation, a codifié toutes les lois, tous les édits et rescrits impériaux qui régissent les Awkafs dans l'Empire Ottoman et il a appelé son ouvrage: *Ithaf Ut-Akhlaf Fi Ahcam Il Awkafs*, c'est-á-dire: "Présent fait á nos successeurs des lois qui régissent les Awkafs." Ce livre a été imprimè par la Faculté de Droit de Stamboul; c'est dire qu'il avait été soumis au préalable à l'approbation des sommités juridiques officieilles de l'Empire. Par conséquent, ou peut considérer ce livre comme un véritable code, reconnu, des Awkafs. Aussi, nous avons cru rendre service aux juristes de l'Europe, qui s'occupent des lois musulmanes et à tous les Européens qui possédent des immeubles en Turquie, en le traduisant du turc en français.'

The book is divided into chapters and articles. Articles 77 and 92 are as follows:—

'Art. 77. Il est nécessaire que l'œuvre pour laquelle est fait un wakf soit, dans son essence et dans l'intention de l'instituant, une œuvre pie. C'est pourquoi, lorsque cette œuvre ne l'est pas, le wakf est nul. Mais, si elle l'est dans son essence, sans l'être dans l'intention de l'instituant et vice versa, le wakf est nul.

Art. 92. La clause d'après laquelle l'instituant d'un wakf en affecte le bénéfico à sa personne et à ses enfants ne vicie point la validité du wakf. Exemple: si quelqu'un fait wakf sa maison à condition que son revenu ou que son usage lui appartiennent durant sa vie et qu'aprés sa mort ils reviennnent à ses petits-enfants, le wakf est

valable et la condition est exécutoire. De même si quelqu'un en faisant wakf sa propriété met la condition que le produit de ce wakf serve à payer ses propres dettes, le cas échéant, le wakf est valable et la condition est exécutoire.'

Chapter iv. is entitled—'Des conditions mentionées par les instituants des wakfs.'

'Sect. Ire.—Des conditions dans les wakfs en faveur des enfants, des parents et des voisins.'

This section deals with the institution on the clear assumption that a provision for the benefit of the founder himself and his descendants is an 'œuvre pie within the meaning of Art. 77, and it, and indeed the whole book, would seem to support the view of the institution taken by Mr. Justice Ameer Ali.

As I have said before, I think the matter one of considerable importance; and as I know that it is considered of vital importance by the Mahomedan community in India, I have thought it worthwhile to draw attention to these facts and authorities in order that when the matter is again brought before the Judicial Committee, as will certainly be the case, the counsel who argue it, and the judges who decide it, may, if they please, be in a position to ascertain how such a question would be dealt with by a Mahomedan Court in a Mahomedan country.

W. C. PETHERAM.

No. 10.—Appendix II to the Memorial; being a Report of the Proceedings in the House of Lords, dated the 29th June, 1896, in regard to the question of the Validity of Wakf according to Mahomedan Law. (A reprint of an Extract from the Parliamentary Report No. 6 for August, 1896, from pages 55, 56, and a part of 57 of Volume VII, No. 8, of a Publication entitled "India.")

Imperial Parliament, June 29th, House of Lords, Mussulman Law in India.

LORD STANLEY OF ALDERLEY rose to ask whether the Secretary of State for India was aware of the alarm prevailing among the Mussulman subjects of her Majesty in India, owing to a recent decision of the Judicial Committee of the Privy Council in the case of Abdul Fata Mahomed Ishak and others *versus* Russomoy Dhar Chowdry and others, the effect of which was to abrogate an important branch of the

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Referered to in paragraph 5, page 3, of the Memorial.